Supreme Court, U.S.
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No. 06-1501

IN THE

Supreme Court of the United States

SHERRI WILLIAMS, B.J. BAILEY, *et al.*,
Petitioners,

v.

TROY KING, in his official capacity as the ATTORNEY GENERAL OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

(Restated)

Whether *Lawrence v. Texas* invalidates an Alabama statute that forbids commercial distribution – but not possession or use – of sexual devices, and that contains exceptions for bona fide medical, scientific, educational, legislative, judicial, or law enforcement purposes?

Whether public morality remains a valid rational basis for restricting public commercial activity after *Lawrence v. Texas*?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

Section 13A-12-200.2(a)(1) of the Code of Alabama 1975, as amended, provides:

> It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a

> corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).

Ala. Code § 13A-12-200.2(a)(1) (2006).

Section 13A-12-200.4 of the Code of Alabama 1975, as amended, provides:

> It shall be an affirmative defense to a charge of violating Sections 13A-12-200.2 and 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

Ala. Code § 13A-12-200.4 (2006).

STATEMENT

In 1998, the Alabama legislature amended the Alabama Anti-Obscenity Enforcement Act, Ala. Code §§ 13A-12-200.1 to 13A-12-200.12 (2006), to prohibit the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Ala. Code § 13A-12-200.2(a)(1) (2006). That same year, Petitioners sued the Attorney General of Alabama, challenging the constitutionality of the prohibition on the sale of sexual devices.[1]

1. *Williams I.* Plaintiffs (Petitioners here) filed their original complaint on July 29, 1998. The parties entered into a lengthy stipulation of facts, and the case was tried on the stipulations and the parties' written and oral arguments to the district court.

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[1] Following the example of the Eleventh Circuit, Respondent "will use the shorthand term 'sexual device' in place of the phrase 'any device designed or marketed as useful primarily for the stimulation of the human genital organs.'" *Williams VI*, Pet. App.4, n. 2.

Based upon the parties' stipulations, the statute's proscription of the distribution of sexual devices in Alabama does not apply to devices acquired as gifts or by purchases in another state, Pet. App. 215, the challenged statute did not "restrict possession or use of a sexual device by an individual, but only the commercial distribution of the devices," Pet. App. 215, and "a number of other sexual products" are "not prohibited by the statute, such as ribbed condoms or the virility drug Viagra." Pet. App. 215.

The district court invalidated the statute. *Williams I*, Pet. App. 133-212. In so doing, the district court held that the statute "bears no reasonable, rational relation to a legitimate state interest." Pet. App. 211. The Attorney General of Alabama appealed the district court's decision to the Eleventh Circuit.

2. *Williams II.* The Eleventh Circuit reversed and remanded. *Williams II*, Pet. App. 213-233. The Eleventh Circuit disagreed with the district court's determination that the statute was irrational, holding that "public morality is a legitimate interest rationally served by the statute." Pet. App. 219.

Next, the court of appeals affirmed the district court's rejection of Petitioners' facial challenge to the statute. Pet. App. 226-30. The court held that "the district court correctly framed the fundamental rights analysis in this case" by asking "the question 'whether the concept of a constitutionally protected "right to privacy" protects an individual's liberty to use [sexual devices] when engaging in lawful, private, sexual activity.'" Pet. App. 227-28 (quoting Pet. App. 171) (second brackets original in *Williams II*). The court then concluded that the statute could be constitutionally applied to the sale of sexual devices to minors and thus was not facially unconstitutional. Pet. App. 230.

Finally, the Eleventh Circuit remanded Petitioners' as-applied challenge for further factual development. Pet. App. 232. The court of appeals concluded that "the record and stipulations in this case simply are too narrow to permit us to decide whether or to what extent the Alabama statute infringes a fundamental right to sexual privacy of the specific plaintiffs in this case." Pet. App. 232.

3. *Williams III.* After the case was remanded, Petitioners amended their complaint to add more plaintiffs and enlarge the record for their as-applied challenge. The next day, they moved for summary judgment. The Attorney General answered plaintiffs' amended complaint and objected to plaintiffs' motion for summary judgment, asking the district court to reopen discovery. The district court denied plaintiffs' motion for summary judgment without prejudice and reopened discovery.

On remand, several additional factual and legal points came to light. First, it became clear on remand, to the extent it was not clear before, that the Anti-Obscenity Enforcement Act permits the distribution of sexual devices for "bona fide medical" and "scientific" purposes. Section 13A-12-200.4 of the Code of Alabama 1975 provides as follows:

> It shall be an affirmative defense to a charge of violating Sections 13A-12-200.2 and 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

Ala. Code § 13A-12-200.4 (2006). As Petitioners challenge § 13A-12-200.2 of the Act, the affirmative defense is unquestionably applicable.

Second, in their depositions and declarations, Petitioners made clear that each of the user plaintiffs has

a bona fide need for sexual devices such that a vendor could sell to them without incurring criminal liability. For instance, Dan Bailey, a 62-year-old man who suffers from erectile dysfunction, stated in his deposition that he has a medical need for the sexual devices and that such devices provide him at least some psychological benefit. Mr. Bailey's wife, B.J. Bailey, stated that her use of sexual devices provides her both medical and psychological benefits. Like the Baileys, Petitioners Jane Doe and Sherri Williams stated that their individual use of sexual devices serves both medical and psychological purposes. Similarly, another married couple, Benny and Deborah Cooper, stated that their use of sexual devices is psychologically beneficial, as did Petitioners Alice Jean Cope and Jane Poe. Finally, Petitioner Jane Roe, a woman with extensive physical disabilities, presented perhaps the most compelling case of an individual with a bona fide medical or psychological need for sexual devices.

Third, the deposition testimony and declarations submitted to the district court established that sexual devices that fall within the statutory prohibition are available just across the state line. In his deposition, Petitioner Dan Bailey acknowledged that sexual devices could be purchased in Tennessee just north of the Alabama state line, a mere six miles from his home. In fact, Mr. Bailey testified that he had visited an adult bookstore in Tennessee, just north of Ardmore, Alabama, that sells sexual devices. Benny Cooper said that he, too, had visited the same establishment and had purchased a sexual device there. Deborah Cooper also stated that she was aware of the Tennessee establishment, and B.J. Bailey testified that she often drove past the store on her way to Pulaski, Tennessee. It is undisputed that § 13A-12-200.2 does not prohibit purchasing sexual devices outside Alabama and bringing them into the State.

Fourth, the facts elicited on remand established that vibrators that do *not* fall within the statutory prohibition

remain freely available in Alabama. Alabama's statute does not proscribe the sale of every device that *can* be used to stimulate the human genital organs. Rather, the statute regulates devices "designed or marketed as useful *primarily* for the stimulation of human genital organs." Ala. Code § 13A-12-200.2(a)(1) (emphasis added). Thus, ordinary vibrators that (although well adapted to uses of a sexual nature) are not designed or marketed as useful primarily for that particular purpose are perfectly lawful in Alabama. These devices include the Hitachi Magic Wand, which one of Petitioners' expert witnesses described as "[o]ne of the most popular masturbatory devices in today's market" and is considered by some to be the "Cadillac" of vibrators. Vibrators that may be sold legally in Alabama also include similar products from manufacturers such as Conair and Sunbeam. Plaintiffs Jane Doe and Jane Poe both testified that they own and use such devices, which are commonly available at retail stores and via the Internet.

Finally, the plaintiffs testified that they already own numerous sexual devices. It is undisputed that § 13A-12-200.2 does not prohibit the *use* of any sexual devices in the State.

After conducting discovery, the parties filed cross motions for summary judgment. In 2002, the district court granted Petitioners' motion and denied the Attorney General's, again striking down the statutory prohibition on the distribution of sexual devices. *Williams III*, Pet. App. 234-333. The court first rejected the Attorney General's arguments on standing. Pet. App. 252-65. The court then agreed with Petitioners that the statute was unconstitutional, recognizing a new fundamental "right to sexual privacy." Pet. App. 236; 265-312. The district court entered a final judgment enjoining *any* enforcement of the statutory prohibition. Pet. App. 332-33. The Attorney General again appealed to the Eleventh Circuit.

4. *Williams IV.* The Court of Appeals again reversed and remanded. Pet. App. 17-71. The Court of Appeals framed the issue on the second appeal as an invitation "to add a new right to the current catalogue of fundamental rights under the Constitution: a right to sexual privacy." Pet. App. 18. The Eleventh Circuit declined the invitation. Pet. App. 18.[2]

The Eleventh Circuit began its analysis by recognizing that the statute in question "proscribes a relatively narrow bandwidth of activity." Pet. App. 18. The court first noted that Alabama only proscribes the sale of sexual devices without criminalizing their use or possession. Pet. App. 18. The court also acknowledged that many other sexual aids are unaffected by the statute and that, in any event, the statute provides an exemption for individuals having legitimate (e.g., medical) needs for sexual devices. Pet. App. 18-19.

The Eleventh Circuit responded to Petitioners' substantive due process argument first by rejecting the notion that a free-standing "right to sexual privacy" had been recognized in *Lawrence v. Texas,* 539 U.S. 558 (2003). The court of appeals refused "to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights." Pet. App. 25-26.

The Eleventh Circuit next analyzed the right asserted by Petitioners under the two-step framework announced in *Washington v. Glucksberg,* 521 U.S. 702 (1997). In doing so, the court of appeals expressly heeded this Court's admonition to "proceed with 'utmost care'" in divining the existence of "extra-textual" constitutional rights. Pet. App. 29 quoting *Glucksberg,* 521 U.S. at 720.

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[2] The Eleventh Circuit affirmed the district court's ruling on the Petitioners' standing. Pet. App. 20-21, n.3.

The Eleventh Circuit held that the district court had erred on remand by failing to articulate a "careful description" of the right asserted, as is required under the first prong of *Glucksberg*. The court of appeals found that the district court had "abandoned its initial careful framing of the issue and instead characterized the asserted right more broadly as a generalized 'right to sexual privacy.'" Pet. App. 30. The court observed that the scope of the right identified by the district court "would theoretically encompass such activities as prostitution, obscenity, and adult incest." Pet. App. 31.[3] Ultimately, the Court of Appeals held that the question presented, when properly and narrowly framed, was whether the Constitution protects a fundamental right to use sexual devices. Pet. App. 35.

The Eleventh Circuit next turned to the second prong of *Glucksberg* to analyze "whether the right to use sexual devices when engaging in lawful, private sexual activity is (1) 'objectively, deeply rooted in this Nation's history and tradition' and (2) 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.'" Pet. App. 36 (quoting *Glucksberg*, 521 U.S. at 721). The court of appeals held that the district court had "erred on four levels" in recognizing a free-floating right to sexual privacy. *Id.* First, the district

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[3] The Eleventh Circuit noted that the ACLU did not purport to extend its position so far: "At oral arguments, the ACLU contended that 'no responsible counsel' would challenge prohibitions such as those against pederasty and adult incest under a 'right to sexual privacy' theory. However, mere faith in the responsibility of the bar scarcely provides a legally cognizable, or constitutionally significant, limiting principle in applying the right in future cases." Pet. App. 30-31 (footnote omitted.) The Eleventh Circuit's skepticism was warranted. *See e.g. State v. Freeman*, 155 Ohio App. 492, 801 N.E.2d 906 (Ohio App. 2003) (criminal defendant seeking to claim a *Lawrence* right to privacy to be applied to adult incest); *State v. Lowe*, 2005 WL 1983964 (Ohio App. Aug. 15, 2005) (same).

court's analysis, which "consisted largely of an irrelevant exploration of the history of sex in America," was too broad. *Id.* Second, the district court's analysis gave undue weight to contemporary sexual practices. *Id.* Third, the district court erred by searching for historical evidence of state non-interference with the right asserted rather than evidence that the asserted right had been affirmatively protected. *Id.* Fourth, the district court placed undue reliance on Petitioners' expert testimony while simultaneously misconstruing the State's arguments as conceding material issues. *Id.* For all of these reasons, the Eleventh Circuit reversed the judgment of the district court, sustained Alabama's regulation of sexual devices, and remanded the case "for further proceedings consistent with [its] opinion." Pet. App. 52. In a footnote, the court of appeals permitted the district court, on remand, to "examine 'whether [its] holding in Williams II that Alabama's law has a rational basis (e.g. public morality) remains good law now that Bowers has been overruled.'" Pet. App. 28, fn. 9 (citation omitted).

Judge Barkett dissented. Pet. App. 53-71. The Eleventh Circuit denied petitions for panel and *en banc* rehearing. 122 Fed. Appx. 988 (11th Cir. 2004) and this Court denied certiorari *sub nom. Williams v. King.* Pet. App. 72.

5. *Williams V.* On remand, the district court upheld the statute and granted the State's motion for summary judgment. Pet. App. 73-132. After carefully reviewing the case's extended procedural history, Pet. App. 89-114, the district court identified the issue before it on remand as whether, in the light of *Lawrence*, the Eleventh Circuit's "'holding in *Williams II* that Alabama's law has a rational basis (*e.g.*, public morality) remains good law." Pet. App. 114 (quoting *Williams IV*, Pet. App. 28, n.9). The district court examined in detail Justice Kennedy's majority opinion in *Lawrence* as well as Justice Scalia's dissent. Pet. App. 114-19. Specifically with respect to the post-

Lawrence legitimacy of the government's interest in public morality, the district court observed, "[w]ith all due respect," that Justice Scalia had "engaged in hyperbole when arguing that *Lawrence* decreed the end of 'all' morals legislation." Pet. App. 119.

The district court observed, "Laws are often based on the moral standards of society. Indeed, if the effects of *Lawrence* are to be construed as Justice Scalia suggests, virtually our entire criminal code would be invalidated, because it is based on social conceptions of 'right' and 'wrong' behavior." Pet. App. 119. The district court noted that "[t]o hold that public morality can *never* serve as a rational basis for legislation after *Lawrence* would cause a 'massive disruption of the current social order.'" Pet. App. 123 (quoting *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting). Accordingly, the district court refused to "invalidate the Alabama law in question here simply because it is founded on concerns over public morality." Pet. App. 123.

The district court distinguished *Lawrence*, noting that the *Lawrence* majority took care to define the scope of its holding to a statute that proscribed private sexual conduct. Pet. App. 130. The district court emphasized that "this case simply is *different* from *Lawrence*" in that the Alabama statute does not proscribe private sexual conduct. Pet. App. 130 (quoting for support the observation in *Williams IV*, Pet. App. 27, n.8, that "[t]here is nothing 'private' or 'consensual' about the advertising and sale of a dildo").

The district court therefore held that "[t]his case does not fit squarely within the mold of *Lawrence*" and that "*Lawrence's* holding – that public morality was not a sufficiently rational basis to support the Texas legislation in question there – does not apply to strike down the Alabama law here." Pet. App. 131. The district court held "[i]n direct answer to the issue on remand" that "the

holding in *Williams II* – that the subject Alabama statute has a rational basis (*e.g.*, public morality) – remains 'good law'" in the wake of *Lawrence*, and that "public morality still may constitutionally serve as a rational basis for the law in question here." Pet. App. 131-32.

6. *Williams VI.* Petitioners appealed, and the Eleventh Circuit affirmed. Pet. App. 3-16. Given the two earlier appeals, the Eleventh Circuit confined the issue on the third appeal to the sole issue considered by the district court: "The only question remaining before us is whether public morality remains a sufficient rational basis for the challenged statute after the Supreme Court's decision in *Lawrence v. Texas*." Pet. App. 4 (citation omitted). *See* Pet. App. 114.

The Eleventh Circuit noted the binding effect of its prior holding under the law-of-the-case doctrine, but noted that an exception is appropriate if "subsequently released controlling authority dictates a contrary result." Pet. App. 10 (quoting *Alphamed, Inc. v. B. Braun Med., Inc.*, 367 F.3d 1280, 1286 (11th Cir. 2004). The court noted the implicit argument of Petitioners that "public morality no longer constitutes a rational basis for government intrusion on private decisions about sexual intimacy" after *Lawrence*. Pet. App. 11.

The court of appeals noted that in *Williams IV*, it had already held that there was no fundamental right at issue, and had applied rational basis scrutiny to the challenged statute. Pet. App. 8-9 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the [law] so long as it bears a rational relation to some legitimate end."). The court reviewed the highly-deferential nature of rational basis review: "A statute is constitutional under rational basis scrutiny so long as 'there is *any reasonably conceivable state of facts* that could provide a rational basis for the [statute].'" Pet. App.

9 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 311 (1993)) (emphasis added in *Williams VI*). The court of appeals also noted this Court's admonition that under the rational basis test, a statute is presumptively constitutional and that the legislative motivation for passage of the statute is irrelevant to the inquiry. Pet. App. 9 (citing *FCC v. Beach Communications, Inc.*, 508 U.S. at 314-15.

The Eleventh Circuit noted that the statute in question "does not target possession, use, or even the gratuitous distribution of sexual devices. In fact, plaintiffs here continue to possess and use such devices." Pet. App. 13. "States have traditionally had the authority to regulate commercial activity they deem harmful to the public." *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). "As we noted in *Williams IV*, the Supreme Court has affirmed on repeated occasions that laws can be based on moral judgments." Pet. App. 13 citing *Williams IV*, Pet. App. 27, n.8. The court stated, "We have also noted: '[o]ne would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale...." Pet. App. 14-15 (citing *Williams IV*, Pet. App. 27-28, n.8).

The Eleventh Circuit concluded that "public morality survives as a rational basis for legislation even after *Lawerence*, and [ ] that in this case the State interest in the preservation of public morality remains a rational basis for the challenged statute." Pet. App. 15.

ARGUMENT

I. *Lawrence v. Texas* Did Not Create a Fundamental Right to Sexual Privacy that Would Prohibit the State's Regulation of the Commercial Sale of Sexual Devices.

Petitioners do not suggest that the holding of the Eleventh Circuit conflicts with the holding of any other circuit or with the express holdings of this Court. Instead, Petitioners assert that the Eleventh Circuit erred by failing to interpret *Lawrence v. Texas* more broadly than any other court has done. The broad reading advocated by Petitioners is inconsistent with the text of the *Lawrence* decision, with the interpretation of *Lawrence* by other courts, and with other decisions of this Court.

After this Court issued its decision in *Lawrence*, the Eleventh Circuit, in *Williams IV*, held that *Lawrence* had not created a new fundamental right,[4] and applied a rational basis scrutiny rather than a higher level of scrutiny to the challenged Alabama statute. Pet. App. 17-52. *Lawrence* confirms that the standard to be applied in this case is rational-basis scrutiny. After expressly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court in *Lawrence* stated its holding in a single sentence:

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[4] Indeed, in *Lawrence*, this Court did not purport to recognize private, consensual, adult homosexual conduct as a fundamental right for substantive due process purposes. As the dissent there noted:

> Not once does [the Court] describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is "'deeply rooted in this Nation's history and tradition,'" the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers'* holding to the contrary.

Lawrence, 539 U.S. at 594 (Scalia, J., dissenting) (citation omitted).

"The Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578 (emphasis added). Under rational-basis scrutiny, the "'test of due process'" is "a *legitimate* legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (emphasis added) (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). The Court's reference in *Lawrence* to the absence of any "legitimate state interest," as Justice Scalia pointed out in his dissent, 539 U.S. at 594, signaled a rational-basis review, not the heightened scrutiny required for restrictions on fundamental rights.

The standard applied by the Eleventh Circuit in *Williams IV* was the correct constitutional standard. Given that this Court in *Lawrence* did not conduct a *Glucksberg* analysis, and given that it did not specifically state that it was creating a new substantive fundamental right, the Eleventh Circuit's correctly applied rational-basis scrutiny.

In their Petition, Petitioners give the impression that this case involves a blanket ban on the sale of sexual devices in Alabama. It does not.

In *Williams IV*, the Eleventh Circuit defined the precise scope of Alabama Code § 13A-12-200.2. The court noted,

> . . . the statute exempts sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose."

Pet. App. 19 (citation omitted) (quoting Ala. Code §§ 13A-12-200.2(a)(1) & 13A-12-200.4). This careful description of the narrow scope of the statute was the basis for the Eleventh Circuit's analysis in *Williams IV* and *Williams VI*. The analysis of Petitioners is less careful.

As the Eleventh Circuit carefully noted, the Alabama statute contains several specific exemptions, including the sale of sexual devices for medical uses. Thus, Petitioners are mistaken when they imply that a multitude of persons with psychological and medical needs are being denied access to sexual devices with a concomitant catastrophic effect on their private sexual activity. *See e.g.* Petition at 6 (referring the Court to "the many recognized therapeutic uses of sexual devices" in the record, and citing the "opinion of medical and psychological professionals" that "the inability to achieve orgasm through sexual intercourse is a treatable medical condition that, if left untreated, may jeopardize a woman's health . . .").

Persons who do not fall within one of the statutory exemptions are able to freely purchase any number of dual purpose implements, or they may choose to import, manufacture, or obtain through the internet sexual devices for their personal and private, non-commercial use. Devices that are legally sold in Alabama include the Hitachi Magic Wand, which one of Petitioners' expert witnesses described as "[o]ne of the most popular masturbatory devices in today's market" and is considered by some to be the "Cadillac" of vibrators.

The Eleventh Circuit's analysis is supported by numerous decisions of federal courts of appeal and State courts of last resort that have applied a rational basis test to *Lawrence*-based challenges. Giving *Lawrence* a narrow reading, those courts have refused to interpret *Lawrence* as creating a fundamental right to sexual privacy that would preclude State regulation of commercial activity. Indeed, courts that have been faced with *Lawrence*-based challenges to morality-based statutes have rejected those challenges generally by narrowly construing the holding in *Lawrence*. *See United States v. Extreme Associates, Inc.*, 431 F.3d 150, 161 (3d Cir. 2005) (refusing to extend *Lawrence* to invalidate Pennsylvania anti-obscenity law);

Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005) (refusing to extend *Lawrence* to protect incest); *United States v. Bach*, 400 F. 3d 622, 628-29 (8th Cir. 2005) (refusing to extend *Lawrence* to protect production and transmission of child pornography); *Fleck & Assoc., Inc. v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006) (refusing to extend *Lawrence* to invalidate zoning ordinance prohibiting "live sex act businesses"). *See also Stadium Book & Video, Inc. v. Miami-Dade County*, 2006 WL 2374740 (S.D. Fla. July 31, 2006) (refusing to extend *Lawrence* to invalidate ordinance requiring "open booths" in adult video stores); *United States v. Thompson*, 458 F. Supp. 2d. 730 (N.D. Ind. 2006) (refusing to recognize *Lawrence* as invalidating prostitution statutes); *Ohio v. Lowe*, 861 N.E.2d 512 (Ohio 2007) (refusing to extend *Lawrence* to provide constitutional protection to incest between stepfather and stepchild).

Indeed, lower courts have consistently given *Lawrence* a narrow construction *See e.g. State v. Holm*, 137 P.3d 726, 743, n.10 (Utah 2006) (noting that "the *Lawrence* opinion has been distinguished more than forty times since it was issued" and citing *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005), for the proposition that "*Lawrence* ... did not announce ... a [constitutionally protected] fundamental right ... to engage in all manner of consensual sexual conduct, specifically in this case, incest," and *United States v. Bach*, 400 F.3d 622, 628-29 (8th Cir. 2005), for the proposition that "*Lawrence* did not protect an adult from criminal sanction for taking pornographic photos of a sixteen-year-old.")

The Eleventh Circuit's analysis is also consistent with the decisions of this Court. For example, although the "mere private possession of obscene material" in the home "cannot constitutionally be made a crime," *Stanley v. Georgia*, 394 U.S. 557, 559 (1969), there is no correlative right to distribute or purchase obscenity in the public marketplace or even to have it distributed to one's home.

See United States v. 12 200-ft Reels of Super 8mm Film, 413 U.S. 123, 128 (1973) (holding that "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others."); *United States v. Orito*, 413 U.S. 139, 141-42 (1973) (rejecting "the idea that some zone of constitutionally protected privacy follows [obscene] material when it is moved outside the home area protected by *Stanley*").

Respondents submit that the Eleventh Circuit and other lower courts have been correct in their narrow construction of *Lawrence* and in their uniform application of rational-basis review to *Lawrence*-based challenges.

II. Public Morality Remains a Valid Rational Basis for Restricting Public Commercial Activity after *Lawrence*.

The Eleventh Circuit concluded that "public morality survives as a rational basis for legislation even after *Lawerence*, and ... that in this case the State's interest in the preservation of public morality remains a rational basis for the challenged statute." *Williams VI*, Pet. App. 15. That decision was correct.

The *Lawrence* decision was limited to the criminalization of private sexual activity. As the Court noted, it "d[id] not involve minors," or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused," or "public conduct or prostitution" or "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578 (citation omitted). Instead, that case "involve[d] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." *Id.*

The Eleventh Circuit distinguished the Alabama statute which forbids only "*public, commercial* activity," Pet. App. 12, *i.e.*, sale of sexual devices from *Lawrence* which expressly "'*d[id] not involve public conduct.*'" *Id.* (quoting *Lawrence*, 539 U.S. at 578) (emphasis added in *Williams VI*). Thus, "[u]nlike *Lawrence*, the activity regulated here is *neither* private *nor* non-commercial." *Williams VI*, Pet. App 12.

Petitioners' argument ignores 150 years of morality-based legislation. While *Lawrence* may have overruled *Bowers v. Hardwick*, *Bowers* is only one of a long and unbroken line of cases that rely upon morals based legislation to bring order to our society. As the Eleventh Circuit observed, this Court "has noted on repeated occasions that laws can be based on moral judgments." Pet. App. 27, n.8 (citing *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (upholding a public indecency statute, noting the authority of the States "to provide for the public health, safety, and morals, and we have upheld such a basis for legislation"); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (noting that "capital punishment is an expression of society's moral outrage at particularly offensive conduct"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (noting State's legitimate interest in regulating obscene material "to protect 'the social interest in order and morality' ")). Pet. App. 27, n.8.

Indeed, any number of issues historically resolved by legislative action are morals-based, including sexual consent, the age of consent to engage in sexual activity, the age of consent to marry, the age at which one becomes an adult for any purpose, bigamy, polygamy, statutory rape, and incest,. It is unreasonable to infer that this Court meant to invalidate a veritable host of statutes without clearly so holding.

Faced with *Lawrence*, the vast majority of courts in this country have interpreted the holding narrowly and

no holding from this Court to date has indicated otherwise.

Relying on *Carey v. Population Services*, 431 U.S. 678 (1977) and *Griswald v. Connecticut*, 381 U.S. 479 (1965), Petitioners argue that, because they may engage in private sexual conduct with limited government interference (if, indeed, they concede that government may interfere in such conduct at all), they cannot be restricted in their ability to purchase the sexual devices they deem necessary for that purpose. Petitioners' analysis ignore a critical distinction, however: *Carey* and *Griswald* involved the exercise of fundamental rights, but the Alabama statute does not impair a fundamental right.

Try as they may, the Petitioners cannot overcome the simple fact that the in-state purchase of recreational sexual devices (which, again, is all the Alabama statute reaches) is a public, commercial transaction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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